Supreme Court, U. S.
FILED
DEC 21 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

TERM .....

No. 79-975

DAVID BELL

Petitioner,

v.

STATE OF NEW YORK

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR SECOND CIRCUIT

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I. OPINIONS OF THE COURTS BELOW

Bell vs. State of New York, 78 Civ2934 (SDNY)

Bell vs. State of New York, 79-2187 (CA -2nd)
(No opinion)

II.JURISDICTION

1. Jurisdiction of this court issues from 28 USC 1254 sub 1

III. QUESTION PRESENTED FOR REVIEW

The threshold question of this habeas corpus proceeding rests upon whether the collateral consequences of petitioner's conviction and sentence are severe enough to place him 'in custody', although he is not now or was not ever incarcerated.

IV. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

1. Title 28 USC sect. 2254
2. The 14th amendment of the United States Constitution.

V. WHEN QUESTION WAS RAISED

Question was first raised in the United States District Court of theSouthern District of New York with the filing of a petition for habeas corpus under 28 USC 2254 on May 25, 1978.

VI. STATEMENT OF CASE

On July 4, 1975, petitioner was accosted in his own business establishment by 3 persons claiming to be police - but without any identification. During the incident, one warning shot was fired by petitioner. Later he was arrested by uniformed local policeman.

On April 20, 1976, after trial, petitioner was convicted of two counts of reckless endangerment in second degree and resisting arrest in the Sullivan County Court of the State of New York and sentenced to one year probation and fined $ 1500.

On May 25, 1978 a petition for habeas corpus was filed in the United States District Court of the Southern District of New York.

On April 30, 1979 the petition was denied by the District Court.

On May 23, 1979 petitioner appealed to the Court of Appeals for the second circuit. On November 30, 1979 the judgement of the lower court was affirmed without opinion.

VII. BASIS FOR FEDERAL JURISDICTION IN THE FIRST INSTANCE.

Jurisdiction arose from 28 USC 2254 and the 14th amendment of the United States Constitution.

VIII. ARGUMENT

Point 1. Reasons why this court should grant review of the writ.

Although the lower courts have recognized that the writ ofhabeas corpus has been extended over the years to go beyond incarceration; each circuit has defined the civil restraints- which survive the conviction- to warrant being 'in custody', on an ad hoc basis. Such a rule of law which makes Federal adjudication dependent upon the accident of petioner's domicile, is an untenable legal concept.

Secondly, the Court of Appeals in affirming the district court's judgement (without opinion) accepted that court's subjective view that petitioner's conviction was of a trivial nature and only equivalent to a fine. This view is controverted by the record. Although petitioner was not incarcerated, the sentence of one year probation hung like a sword over petitioner's head withan implied threat of control by the court or even re-sentencing during the probationary period. " It is not physical custody that gives standing to habeas corpus it is instead the restraint on liberty whether physical or of amore subtle nature." Glover vs McCarthy, 301 F Supp. 364.

This court should rule whether a first offender(i.e. like petitioner) trapped by cicumstances, is less equal under the law than the numerous recidivists being allowed relief, who are not in actual physical custody. (See citations infra)

Point II.- The collateral consequences of the conviction are severe enough to warrant petitioner as being 'in custody'.

The United States Supreme Court in Carafas vs La Vallee, 391 US 234(cited by the district court) fully recognized that serious collateral consequences may flow from a conviction and continue to restrict a persons freedom even after he has completed his sentence.

Petitioner submits that the severity of the sentence is not of itself related to the possible severity of the collateral consequences which survive it. See Clay vs. Riddle, 4th circ. 541 F 2d 456 which involved a traffic offense and a 30 day sentence.

The question of whether the surviving consequences are serious enough to warrant as being'in custody' is subjective and must be viewed in the context of backround, character and reputation of the petitioner.

To this petitioner, the moral and spiritual weight of the conviction and sentence is a cross he cannot bear, and he submits that were it otherwise he would not be here before this court seeking relief.

Up to this abortive incident, petitioner, for 58 years, had been a peace loving law-abiding citizen, never accused or arrested for any violation of law. Petitioner was active in civic affairs in the community and whose character and good reputation was attested to by leading citizens and two judges.

To the humiliation of the arrest, trial and conviction and attendent exetensive publicity must be added the civil disabilities of the conviction, spelled out in New York State statutes. Based on these statutes a certificate of relief from some of these disabilities was granted by the State of New York to this petitioner. The certificate is not absolute or final and is revokable. Petitioner cannot hold public office or be an officer in any union, the certificate states thatit," shall not prevent any judicial, administrative, licensing or other body, board or authority from relying upon the conviction- as a basis for the excercise of it's discretionary power to suspend, revoke, refuse to issue or renew any license, permit or other authority or privilege."

In light of the aforementioned restraint of his civil rights, is it not clear that petitioner, " is suffering and will continue to suffer serious disabilities because of the laws complexities and not because of his fault, if his claim that he has been illegally convicted is meritorious." Carafas supra at 239.

On the other hand, clearly to a person who has been previously incarcerated or arrested before, the conviction and sentence of petitioner would be considered trivial, accepted and even welcomed.

Although the merits of petitioner's claim are now, not at issue; he submits that the record fully supports his allegations that he was denied a fair trial, guaranteed by the 14th amendment of the United States Constitution, that the conviction was a gross miscarriage of justice and that there are ample and sufficient grounds for reversal of the conviction on the merits.

CONCLUSION

The Court should clearly define the scope of the collateral consequences -which survive the conviction-, so that the ad hoc decisions of the courts below - repugnant to the concept of equal justice - would be obviated.

This petition for Writ of Certiorari should be granted, and full argument heard by this court on the merits of petitioner's claim.

Dated: December 10, 1979
Monticello N.Y.

Respectfully,

David Bell
Petitioner, pro se

UNITED STATES COURT OF APPEALS
For the Second Circuit

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 30th day of November,1979

PRESENT: Hon. William H. Mulligan
Hon. ThomasJ. Meskill
Hon. Amalya L. Kearse

Circuit Judges

David Bell,
Petitioner-Appellant

-against-

78-2187

State of New York,
Respondent- Appellee.

Appeal from the United States District Court for the Southern District of N.Y.

This cause came on to be heard on the transcript of record from the U.S. District Court for the Southern District of N.Y. and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgement of said District Court be and it hereby is affirmed on the opinion below of Hon. Robert L. Carter, 78 Civ 2934 (SDNY April 30, 1979)

William H. Mulligan
Thomas J. Meskill
Amalya L. Kearse

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

David Bell,
Petitioner,

-against-

78 Civ 2934 (RLC)

State of New York,
Respondent.

APPEARANCES

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By: Clement H. Berne
Deputy Asst. Atty. Gen.

CARTER,D.J.

OPINION

David Bell has filed a petition for a writ of habeas corpus pursuant to 28 USC 2254 challenging his conviction for the crimes of reckless endangerment in second degree, N.Y. Penal Law 120.20 (McKinney)and resisting arrest, N.Y. Penal Law 205.30 (McKinney). The state opposes the petition and has submitted an affidavit

FACTS

Based upon the briefs submitted by both parties and the transcript of the trial, the relevant facts may be summarized as follows: In the early morning hors of July 4, 1975, Bell, general manager of a motor lodge, was called to the establishments lounge because of some altercation. Upon entering the lounge armed with a pistol, petitioner encountered two individuals engaged in conversation with Chester Shapiro, the motel lodge's bar manager. These individuals were undercoverpolice officers who, shortly before Bell's arrival on the scene,had arrested Shapiro for allegedly soliciting an undercover police officer to engage in prostitution and for offering her a white powder that was alleged to be cocaine. When the policeofficers informed petitioner of their identity he demanded indentification, There is some conflict in the testimony as to the officers response. They have testified that Bell refused to permit them to produce the identification, but Bell claims that the officers simply refused to respond to his request, Petitioner then forced the officers out of the lounge at gunpoint, and Shapiro left.After ejecting the officers from the premises, petitioner fired a single warning shot. Upon leaving the lounge a short time

later, petitioner approached two uniformed police officers near the motor lodge and was arrested.

Bell was subsequently indicted and brought to trial before ajury in the County Court of Sullivan County. On April 20, 1976, he was convicted of the crimes of reckless endangerment in second degree andresisting arrest, and was sentenced to a one year cnditional discharge and a fine of $ 750 on each count. Petitioner paid the $ 1500 fine on April 21, 1976 and was never incarcerated.

On January 9, 1978, the judgement was affirmed by the Appellate Division, Third Department. The Court of Appeals (Jones,J.) denied leave to appeal on February 21, 1978, and it also denied applications for reconsideration on March 10 and April 11, 1978. Petitioner filed this petition on June 28, 1978.

DISCUSSION

Petitioner seeks to overturn the state court's judgement on the ground that he was convicted without due process of law (U.S. Constit. Amend. XIV) He advances a variety of arguments in support of his petition. First, Bell was indicted jointly with the bar manager, Shapiro, who was prosecuted for prostitution and possession of narcotics. This, Bell claims, improperly prejudiced the Grand Jury against him. because it implied he was connected with the charges brought against Shapiro. Second, Bell claims inflammatory statements made to the news media by police prevented him from receiving a fair trial by an impartial jury. Next, Bell asserts that police officers were permitted at

trial to give inflammatory and hearsay testimony concerning their alleged transactions with Shapiro, thereby improperly prejudicing the jury against petitioner, Bell argues generally that he was improperly denied the opportunity to raise certain arguments or introduce certain evidence ar trial and, finally that the New York State Police and State Liquor Authority conspired to influence the trial and obtain a conviction.

The Threshold issue in a petition brought under 28 USC 2254(L) is a determination of whether"a person is in custody pursuantto the judgement of the state court. ....." A writ of habeas corpus is an extraordinary remedy that will not lie unless subtantial restraints are placed upona person's freedom. Faye vs Noia. 372 Us 391, 83 S.CT. 822, 9 L Ed 2d 837 (1963); Roddy vs Black, 516 F 2d 1380, 1383 (6th circ1975) Cert denied, 423 US 917, 96 S Ct. 226, 46 L Ed 2d 147; United States ex rel La Near vs La Vallee 306 F 2d 417 (2d Cir. 1962)

Petitioner is correct when he argues that the definition of custody has been expanded beyond the scope of physical detention. In Carafas vs. La Vallee391 US 234, 88 S Ct. 1556, 20 L Ed 2d 554 (1968), the Supreme Court recognized that seriouscollateral consequences may flow from a conviction and continue to restrict a person's freedom even after he has completed his sentence. This doctrine of collateral consequences has most often been invoked in cases where a court maintains jurisdiction over a petition after the petitioner has been released from physical confinement. See Carafas vs La Vallee supra, 391 Us at 239. Neverthless, a writ may also lie where the petitioner has never been confined, but suffers collateral

consequences so severe as to be tantamount to custody.

However, a close inspection of the conditions attached to Bell's one year conditional discharge discloses no restrictions harsh enough to constitute custody. Petititioner was merly directed " to avoid any injurious or viscious habits, ... refrian from frequenting unlawful places and consorting with disreputable persons; ... and refrian from any further violations of the law. Stenographic minutes of Trial People v. Bell p. 973. Petitioner's sentence was therefore analogous to a fine-only conviction, for which federal habeas corpus will not lie. Hanson v. Circuit Court of First Judicial Circuit of Illinois , 591 F 2d 404(7th Cir. 1979).

Petitioner further alleges that the damage to his good name and reputation are equivalent to custody, The Proposition is without merit. Its adoption would render the custody prereqüisite meaningless, since every person convicted of a violation, no matter how minor,could claim reputational damage. Petitioner's final allegation that he suffers from civil disabilities is unsubstantiated by the record. It is true that habeas corpus review may be appropriate where the collateral consequences of the conviction impose severe burdens on the petitioner by for example, preventing him from voting, serving as a juror or union official, engaging in certian businesses, or obtaining a firearms permit or drivers license. Carafas vs La Vallee, supra, 391 Us at 237; Justin vs Jacobs449 F 2d 1017, 1019(DC Circ. 1971), However, since the crimes of which Bell was convicted are

misdemeanors rather than felonies, he is deprived of neither his right to vote, N.Y. Election Law 5-106(2) (McKinney), nor his real estate broker's license, N.Y. Real Property Law, 440-a (Mc Kinney). Carafas indicates that only severe restraints will satisfy the " in custody"requirement, and petitioner has failed to allege any specific disabilities.

Accordingly, the petition is denied.

IT IS SO ORDERED.

Dated: New York N.Y.
April 30, 1979

Robert L. Carter
U.S.D.J.

Supreme Court, U. S.
FILED
MAR 14 1980
MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

Term ..October..1979.....

No. 79-975

David Bell,

Petitioner,

v.

State of New York,

Respondent.

SUPPLEMENTARY ARGUMENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR SECOND CIRCUIT

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ARGUMENT

POINT I - A sentence of a fine only is no bar to consideration of a claim of due process deprivation by federal courts.

The district court in dismissing petitioner's writ of habeas corpus, belittled the seriousness of the civil disabilities which survived the conviction and compared the sentence, " as being analagous to a fine only, for which habeas corpus will not lie". (opinion of Judge Carter). Even if the record did not clearly refute the lower court's contention; appellant submits that Thompson vs City of Louisville (362 US 199) would be controlling.

Thompson involved two $ 10 fines for disorderly conduct and resisting arrest, without incarceration. The Supreme Court in granting certiorari and examining the record stated; " that although the fines are small, the due process questions presented are substantial ------", and then reversed the conviction as justified by the clear deprivation of due process claims of petitioner. (Compare Yicks vs Hopkins, 118 US 356).

Also compare petitioner's conviction of reckless endangerment in second degree and resisting arrest with a sentence of two $ 750 fines and conditional release for one year probationary period; during which his civil liberties were curtailed and all of which survive to present.

Petitioner submits that had he refused to pay the fine, he would have exposed himself to the risk of incarceration; in such case the procedural bar raised by district court would have no grounds.

" The absence of confinement does not render the punishment trivial". (See dissent of Douglas infra 910) Is the law-abiding citizen -entrapped by circumstance - to be penalized because he obeys the court ?

POINT II - The court should consider the appeal as a proceeding for declaratory judgement under 28 USC 2201, if it finds insufficient grounds to support habeas corpus.

In Jones vs U.S. et al, 419 US 907, C.A. 9th circ., certiorari denied; Justice Douglas in his dissent raises a question which appellant submits is timely and proper for the instant cause, by this court.

Douglas' view in that matter correctly pointed out that, " although the writ was denied below on the sole ground that petitioner was not in custody as required by 2241 -------- the district court should have treated petitioner's complaint as either one seeking a declaration that his punishment was not lawfully imposed, 28 USC 2201, or one to compel expunction of his conviction, 28 USC 1361,

and reached the merits (emphasis added)".

" A determination of these claims by a federal court is an indispensable safeguard of the rights of the accused". (Jones)

In the Jones appeal, he was convicted by court martial of failure to obey an order. The punishment was a fine of $ 1500 without incarceration. After exhausting appeals, petitioner sought a writ of habeas corpus from the district court.

In this appeal (Bell) he also seeks a hearing of the merits of his allegations of a deprivation of due process, after exhausting his state appeals.

Petitioner respectfully submits that a denial of certiorari - not on the merits - would be no bar to a new procedding by petitioner in federal courts under 28 USC 2201.

POINT III - The collateral issue of the merits of petitioner's claims would assist the court's understanding of the significance of the federal question raised herein.

Appellant submits that the record of the trial the Grand Jury minutes and other collateral evidence (not now part of the record) would clearly indicate the validity of petitioner's allegations that he was denied a fair trial and due process; and that the

conviction and sentence was a gross miscarriage of justice, to wit:

1. That highly inflammatory hearsay testimony (of alleged crimes by other, and not connected or charged to petitioner) was permitted at the trial, which influenced the jury to the extreme prejudice of petitioner. (Testimony of Mulcahey, R. 144-149)

2. That at the trial, petitioner first became aware that the same prejudicial testimony was permitted at the Grand Jury proceedings, with a display of narcotics and other material to inflame the jury as against petitioner, (although appellant was not accused or charged with knowing of these alleged crimes by others). An application by petitioner to have the Grand Jury minutes brought up and considered by the appellate court,in camera, to support his allegations; was denied.

3. That petitioner was denied by the trial court of an offer of proof, of a similar incident at the same premises about two months previous (armed robbery, assault requiring hospitalization of bar manager with 38 stitches in his head and an impersonation by someone as an officer, to which the sheriff of Sullivan County could testify) This defense would have supported the absence of intent and justification for petitioner's acts.(R. 601 - 619)

4. That highly infammatory statements were made to the news media by police, when arrested, which connected him by implication with alleged crimes by other (narcotics and prostitution); and crime of attempted murder (never charged in the information or by Grand Jury). That the same inflammatory statements were repeated during the trial and widely publicized by the news media, which influenced the jury as against the petitioner (evidence not part of the trial record and in possession of appellant is available at an evidentiary hearing.)

5. That two politically powerful state agencies (New York State Liquor Authority and New York State Police) were involved in a conspiracy to"bust" the appelant's liquor license, and it is alleged placed heavy political pressure on the court to obtain a conviction.

Two case arising from the abortive incident, alleging violations of appellant's civil rightss were subsequently filed in the Southern District Court of New York. Bell vs Roth et al, (76 Civ 420) a conspiracy action was dismissed and on appeal was confirmed by the 2nd circ. (79 -7014). Bell vs Ward, (76 Civ 2507)police miscnduct) was settled with ad mission by State of New York of appellant's claim.

In both these suits, extensive depositions and evidence was collected, which if presented at an evidentiary hearing would support appellant's allegations of a conspiracy.

CONCLUSION

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED: AND THE ENTIRE RECORD BROUGHT UP FROM LOWER COURTS FOR A FULL EVIDENTIARY HEARING OF PETITIONER'SCOMPLAINT.

Dated:

Respectfully Submitted

David Bell

Supreme Court, U. S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-975

DAVID BELL,

Petitioner,

against

STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION TO CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-975

DAVID BELL, *Petitioner,*

against

STATE OF NEW YORK, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION TO CERTIORARI

Opinion Below

Copies of the opinion of the District Court, unreported to date, and the order of the Court of Appeals for the Second Circuit, affirming on the opinion below, are annexed to the petition.

Jurisdiction

Petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C.A. § 1254(1).

Questions Presented

1. Whether the district court was correct in denying the petition for a writ of habeas corpus on the grounds that the sentence imposed, a $1500 fine and a one year conditional discharge, contained no restrictions harsh enough to constitute custody and that consequently the jurisdictional requirement of 28 U.S.C. §§ 2241(c)(5), 2254(a) was not satisfied?

2. Whether the present proceeding should have been dismissed for lack of subject matter jurisdiction because the fine imposed had been paid and the term of the conditional discharge had expired long before the filing of the petition for a writ of habeas corpus?

Facts

Petitioner was convicted on April 20, 1976 after a jury trial in the County Court of Sullivan County on the crimes of reckless endangerment in the second degree (Penal Law § 120.20) and resisting arrest (Penal Law § 205.30). The sentence imposed was a fine of $750 on each count and two one-year conditional discharges to run concurrently. In explaining the terms of the conditional discharge, the trial court stated:

> ". . . you are to avoid any injurious or vicious habits, you are to refrain from frequenting unlawful places and consorting with disreputable persons; you are to refrain from any further violations of the law.

> Now, these conditions I know you can comply with because I am sure that based upon your past background you are not criminally inclined to do any of these things. However, those are the conditions that must be complied with." [trial minutes at 973]

Petitioner paid the $1500 fine on April 21, 1976, and the period of conditional discharge expired on April 19, 1977.

The judgment of conviction was affirmed by the Appellate Division, Third Department, on January 9, 1978. The New York Court of Appeals denied leave to appeal on February 21, 1978. Applications for reconsideration of the denial of leave to appeal were denied by the Court of Appeals on March 10, 1978 and April 11, 1978.

Some two years after paying the fine and one year after completing the conditional discharge petitioner commenced the present proceeding.

REASONS FOR DENYING CERTIORARI

A.

The District Court Correctly Denied Habeas Corpus Relief as the State Sentence Contained No Restrictions Constituting Custody and the District Court, Therefore, Was Without Jurisdiction to Entertain the Petition.

The federal courts will entertain applications for habeas corpus relief only on behalf of persons "in custody" pursuant to state court judgments of conviction. 28 U.S.C.A. §§ 2241(c)(3), 2254(a). *Carafis* v. *LaVallee,* 391 U.S. 234, 238 (1968); *Russell* v. *City of Pierre,* 530 F. 2d 791, 792 (8th Cir.), *cert. denied* 429 U.S. 855 (1976); *Pueschel* v. *Leuba,* 383 F. Supp. 576, 579 (D. Conn. 1974). The "in custody" jurisdictional requirement has been relaxed somewhat to include more than the imposition of a term of imprisonment. See *Jones* v. *Cunningham,* 371 U.S. 236

(1963) (persons under parole supervision); *Hensley* v. *Municipal Court,* 411 U.S. 345 (1973) (persons released on their own recognizance but facing future incarceration should habeas relief be denied). This Court, however, has continued to emphasize that the extraordinary remedy of habeas corpus is limited to cases of special urgency where "severe restraints on individual liberty" are imposed and that only the more conventional remedies are available in other cases. *Id.* at 351. As the state court imposed no severe restraints in the present case, the district court correctly ruled that the federal courts are without subject matter jurisdiction to review petitioner's claims.

Petitioner's sentence was a $1500 fine and a conditional discharge. It is well settled that the imposition of a fine does not constitute a restraint sufficient to confer jurisdiction upon the federal habeas court. *Hanson* v. *Circuit Court,* 591 F. 2d 404 (7th Cir. 1979); *Russell* v. *City of Pierre, supra; Edmonds* v. *Won Bae Chang,* 509 F. 2d 39 (9th Cir.), *cert. denied* 423 U.S. 825 (1975); *Schifter* v. *United States,* 428 F. Supp. 611 (EDNY 1977); *Peuschel* v. *Leuba, supra.*

Moreover, as the district court correctly ruled, the terms of the conditional discharge included "no restrictions harsh enough to constitute custody" (A. 6).* New York Penal Law §§ 65.01(1), (2) provide that where appropriate the sentencing court shall release the defendant without imprisonment or supervision, but subject during a set period to such conditions as the court specifies. In the present case the sentencing court instructed petitioner,

> "to avoid any injurious or vicious habits . . . to refrain from frequenting unlawful places and consorting with disruptable persons . . . to refrain from any further violations of the law." [trial minutes at 973].

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* Page references preceded by "A" are to the Appendix annexed to the petition.

Thus, petitioner was subject to neither the close personal supervision concerning the details of his private life, nor the imminent threat of imprisonment without a court hearing, which are imposed upon persons on probation or parole. See *Jones* v. *Cunningham, supra,* 371 U.S. at 241-242. Like revocation of the driving privilege, which certainly would be a more serious and disruptive restriction of liberty, the conditions of petitioner's discharge do not constitute the sort of severe restraint which has been held to be the equivalent of physical custody for purposes of establishing federal habeas jurisdiction. *Cf. Westberry* v. *Keith,* 434 F. 2d 623 (5th Cir. 1970). Accordingly, the District Court correctly denied the petition.

B.

Assuming, *Arguendo,* That the Sentence Imposed Constituted Custody, the Petition Was Nevertheless Properly Denied as the Sentence Was Fully Satisfied Prior to the Commencement of This Proceeding.

In defining the jurisdiction of the federal courts the habeas corpus statute "requires that the applicant must be 'in custody' when the application for habeas corpus is filed". *Carafis* v. *LaVallee, supra,* 391 U.S. at 238; *accord, United States ex rel. Myers* v. *Smith,* 444 F. 2d 75 (2d Cir. 1971); *United States ex rel. Wojtycha* v. *Hopkins,* 517 F. 2d 420, 423 n. 6 (3d Cir. 1975). While the collateral consequences of conviction may prevent the timely commenced proceeding from becoming moot subsequent to the satisfaction of the sentence imposed, such disabilities are by themselves insufficient to establish subject matter jurisdiction. *Carafis* v. *LaVallee, supra; United States ex rel. Myers* v. *Smith, supra,* 444 F. 2d at 77; *Pueschel* v. *Leuba, supra,* 383 F. Supp. at 80. As the district court observed, to hold otherwise would be to "render the custody prerequisite entirely meaningless" (A. 6); *accord Furey* v. *Hyland,* 395 F. Supp. 1356, 1360 (D.N.J. 1975), *aff'd* 532 F. 2d 746 (3d Cir. 1976).

In the present case petitioner fully paid the fine on April 21, 1976. The one year period of conditional discharge commenced on the day it was imposed, New York Penal Law § 65.15(1), and expired on April 19, 1977. The petition, dated May 25, 1978, was filed on June 28, 1978, more than a year after the sentence was fully satisfied. Thus, even assuming, *arguendo,* that the sentence imposed constituted custody within the meaning of the federal habeas corpus statute, petitioner was nevertheless not in custody at the time this proceeding was commenced. Accordingly, federal jurisdiction did not attach, and for this additional reason the petition for *certiorari* should be denied.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Dated: New York, New York
March 3, 1980

Respectfully submitted,

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Solicitor General

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of Counsel